

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

TANYA CONSTANTINE

*** CIVIL NO. 6:09-2224**

VERSUS

*** JUDGE MELANCON**

CITY OF KAPLAN, ET AL.

*** MAGISTRATE JUDGE HILL**

REPORT AND RECOMMENDATION

Before the court is the Motion to Dismiss filed by Melissa Suire (“Suire”). [rec. doc. 5].

By this Motion, Suire requests that she be dismissed with prejudice from this action on grounds of insufficiency of citation and service of process. A hearing on the Motion was held on February 17, 2010.

LAW AND ANALYSIS

The instant suit was filed in state court on September 8, 2009. The record reflects that Constantine timely requested citation and service on Suire on December 7, 2009, within the ninety day period provided by La.C.C.P. art. 1201 (C) and La.R.S. 13:5107(D)(1). [rec. doc. 3-1, pg. 6-10]. The record further reflects that on December 23, 2009 service on Suire was attempted. [See Plaintiff’s exhibit 1, entered at the February 17, 2010 hearing].

In her Opposition to the instant Motion, Constantine asserts that even if citation and service of process on Suire was deficient, under both Louisiana state law and federal law, dismissal with prejudice is not appropriate because the grounds for Suire’s objection may be removed by the grant of additional time within which to effect service. See La.C.C.P. art. 932(A) and Rule 4(m), F.R.C.P. Constantine therefore requested additional time within which

to effect service.

During the February 17, 2010 hearing, the undersigned agreed. Therefore, without deciding whether service was properly made on Melissa Suire prior to the removal of this action, the undersigned construed Constantine's Opposition as a Motion for Extension of Time to Effect Service of Process, granted the Motion as construed, and has allowed service to be effected on Melissa Suire on or before March 19, 2010, reserving Suire's right to file an appropriate dispositive motion based on prescription. Under these circumstances;

IT IS RECOMMENDED that the Motion to Dismiss filed by Melissa Suire [rec. doc. 5] be **DISMISSED as MOOT**.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this report and recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the district court, except upon grounds of plain error. Douglass v. United Services Automobile Association, 79 F.3d. 1415 (5th Cir. 1996).

Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

Signed this 18th day of February, 2010, at Lafayette, Louisiana.


C. MICHAEL HILL
UNITED STATES MAGISTRATE JUDGE